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IN THE

Supreme Court of the United States

October Term, 1964

No. 990

MILTON A. GALAMISON, *et al.*,

Petitioners,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Statement

This memorandum is in opposition to a petition made by Milton A. Galamison and others that writs of certiorari be issued to review the orders and judgments of the United States Court of Appeals for the Second Circuit, entered on January 26, 1965, affirming orders and judgments of the United States District Court for the Southern and Eastern Districts of New York remanding criminal prosecutions pending in the Criminal Court of the City of New York which had been removed to the said United States District Court allegedly pursuant to the provisions of Title 28, United States Code, Section 1443 *et seq.*

The opinions of the Court of Appeals are not yet reported.

The petition incorporated the opinions as Appendix A and the printed copy of the opinions will undoubtedly be submitted to the Court by petitioners.

Sole Question Presented

Whether State Court prosecutions may be removed to the Federal District Court under Title 28, U.S.C. 1443, Subdivision 2, where the petitions fail to set forth any law providing for equal rights under which color of authority was allegedly obtained by the petitioners to perform the acts with which they are charged in the criminal proceedings pending in the State Courts.

Proceedings in the Court Below

A

A single petition was filed in the United States District Court, Eastern District of New York, by approximately 50 petitioners who were defendants in various criminal proceedings pending in the Criminal Court of the City of New York, County of Queens. Some of the defendants were charged with the commission of crimes on April 4, 1964, and others on April 22, 1964. Some were charged with crimes committed in front of the 110th Police Precinct, others with crimes committed underneath or near subway stations and others with crimes committed on the tracks of an elevated transit system, others with commission of crimes in front of the grounds of the New York City Worlds Fair and others with crimes committed within the grounds of the said Worlds Fair. Some of these various defendants were charged with the offense of disorderly conduct and

others with resisting arrest, obstructing railway cars and trespass on real property, the latter charges being misdemeanors pursuant to the Penal Law of the State of New York. In a somewhat similar proceeding in the United States District Court for the Southern District of New York, petitions for removal of criminal prosecutions to that court were filed by persons charged with disorderly conduct and inducing truancy in the vicinity of a public Junior High School in the County of Bronx, State of New York.

B

The United States District Courts for the Eastern and Southern District of New York issued an order remanding the said prosecutions to the State Court.

C

On January 26, 1965, the Court of Appeals handed down an opinion determining the issues arising out of the proceedings of the United States District Court for the Eastern District of New York and also with respect to orders of remand which had been granted by the United States District Court for the Southern District of New York, all of the appeals on such orders having been heard together.

Although the petition had made general, non factual and conclusory statements to indicate that removal was made pursuant to 28 U.S.C. 1443, Subdivision 1 and Subdivision 2, in the Court of Appeals the petitioners relied solely on their alleged right to removal pursuant to Subdivision 2, in that they alleged that the acts committed by them were made pursuant to color of authority derived from a law providing for equal rights. The decision of the Court of

Appeals, affirming the orders of remand, was by a divided vote.

As far as these petitioners are concerned, the majority held:

> "(4) When the removal statute speaks of 'color of authority derived from' a law providing for equal rights, it refers to a situation where the lawmakers manifested an affirmative intention that a beneficiary of such a law should be able to do something and not merely to one where he may have a valid defense or be entitled to have civil or criminal liability imposed on those interfering with him.
>
> (5) When the removal statute speaks of 'any law providing for equal rights,' it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U.S.C. Section 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all." (at p. 995)

Reasons for Denying the Writ

(a). The Petitioners have failed to show sufficient reason for consideration of this case by the United States Supreme Court.

The United States Supreme Court does not hear, consider and write upon every so-called legal problem considered by the courts below. The mere fact that these cases were clothed by the Petitioners with a mantle of subject matter which at present is prominent, insofar as the rights of Negroes are concerned, does not necessarily warrant consideration by this court of a situation involving

the application of ordinary police power statutes of New York State to ordinary conduct falling within the definition of those statutes. There are, tangentially, current problems involved in the struggle of the American Negroes for equal rights. This court has not yet proclaimed an "open door" policy to the hearing and determination of every law suit in which a state charges an individual with a violation of state law simply because the individual alleges that his conduct was inspired by his desire to obtain equal rights for those to whom they are denied.

For the first time, after one hundred years on the books, this statute is now attempted to be employed upon novel theories of interpretation never before contemplated or even suggested in relation to that statute—theories which would result in emasculating the police power of the state and destroying the effectiveness of the state judiciary system in dealing with matters of purely local concern.

The reference to *Rachel* v. *The State of Georgia*, 21354, 5th Circuit, is not proper to this petition, inasmuch as *Rachel* deals solely with section 1443 sub-division 1 and petitioners have acknowledged to the Court of Appeals that sub-division 1 is not applicable here.

(b). The interpretation of the majority of the lower court is correct and is not in conflict with the decisions of this court.

The arguments presented at pages 11-15 of the petition do not fairly present the holding of the majority.

The petitioners incorrectly state the language of the court. Firstly, there is no statement by the court below that the language "any law providing for equal civil

rights'' in sub-division 1 also appears in sub-division 2. (See petition page 11.)

Furthermore, petitioners' statement that ''the majority opinion concedes that the laws 'providing for equal civil rights,' upon which petitioners here derive their 'color of authority,' the Equal Protection Clause and the general Civil Rights Acts . . .,'' is incorrect. The court, on the contrary, held that:

> ''Neither the equal protection clause nor section 1981 confers 'color of authority' to perform acts which a state alleges to be in violation of laws of general application intended to preserve the peace from disturbance by anyone. The constitutional provision and the statute are addressed to preventing inequality in the treatment of conduct, and to that great purpose alone. They give no constitutional defense, let alone 'authority,' for disregard of laws providing for the equal punishment of disturbers of the peace simply because the disturbances were in the course of protests over alleged denial of equality in schools, housing or economic opportunity—any more than the Second Amendment bestows 'authority' to disturb the peace in the course of a protest over an alleged denial of the right to keep arms or the Fourth Amendment does so with respect to a protest over police methods'' (at page 983).*

The petitioners' quotations from *Strauder* v. *West Virginia*, 100 U.S. 303, and the *Slaughter-House* Case, 16 Wall 36, do not help the petitioners. Securing to a race all the civil rights that any other race may enjoy and the security

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* The court could have added a further example of the First Amendment not permitting an individual to cry "fire" in a crowded theatre.

and firm estalishment of freedom and the protection of a citizen from oppression cannot be held to direct, encourage, authorize, empower or give even a scintilla of "color of authority" to lie on subway tracks to prevent the movement of passenger trains, or to lie on roadways to prevent the movement of materiel trucks or to encourage truancy by school children. Petitioners do not allege that they are being discriminated against in these criminal prosecutions, but apparently contend that any such acts are not within the jurisdictional power of the state to hear and determine.

(c). The contemporary importance of the civil rights removal statute was not overlooked by the Court of Appeals.

If anything, a reading of the opinions would indicate that the Circuit Court gave this issue considerably more thought than the fundamental issue involved would require. The fact which can hardly be overlooked is that, because the court was aware as everyone else is of the current struggle by all Negro Americans for equality, it gave painstaking and extraordinary consideration to petitioners' contentions and arrived at the only rational result that the law permits.

(d). The District Court was not in error when it denied a hearing as requested by these petitioners.

Petitioners attempted to have the court hold a hearing where they proposed to examine the Governor of the State of New York, the Mayor of the City of New York, the Commissioner of Police, the District Attorneys and many other governmental authorities and leading officers of various

unions, to establish that certain discriminating practices were present in public building, housing and education.

Inasmuch as the petitioners withdrew any contentions under section 1443 sub-division 1, such hearing would have been of no value.

Furthermore, even though discriminatory practices might exist, there would be no basis for the court's transferring these prosecutions to the Federal court under the statute in question.

However, it should be emphasized that the State of New York has never refused to enforce its anti-discrimination statutes. New York was the first state to establish its constitutional right to enforce its anti-discrimination policies against labor organizations. *Railway Mail Assn.* v. *Corsi*, 293 N.Y. 315, aff'd. 326 U.S. 88 (1945). Prior to the commencement of these actions, the Civil Rights Bureau of the New York Attorney General's office, after a detailed investigation, filed a complaint with the State Commission for Human Rights charging racial discrimination in the apprenticeship program of the Sheet Metal Industry in New York City (*Lefkowitz* v. *Farrell, et al.*, C-9287-63). After lengthy public hearings, the State Commission in an opinion issued on February 26, 1964 found Local Union No. 28 of the Sheet Metal Workers International Association and the members of the Joint Apprenticeship Committee to be in violation of the New York Law Against Discrimination and by order dated March 20, 1964 directed Local No. 28 and the Joint Apprenticeship Committee to adopt and pursue objective standards which will insure that "the selection of apprentices will henceforth be made on the

basis of qualifications alone and without regard to race, creed, color or national origin." The affirmative provisions of the Commission's order, including the adoption of objective standards and the barring of nepotism in the selection of apprentices were sustained in *Matter of State Commission For Human Rights* v. *Farrell, et al.*, 43 Misc. 2d 958 (1964) which has been aptly described as a "landmark decision" with "overtones of precedent for all other unions in the State, particularly those in the building trades" New York Herald Tribune, Aug. 25, 1964, page 10.

Thus, New York needs no judicial prodding to enforce its many anti-discrimination statutes, but, rather, welcomes and encourages aggrieved parties to bring any information they may have with regard to discriminatory conduct to the attention of proper public agencies so that appropriate action may be taken.

In *Bell* v. *Maryland*, 378 U.S. 226, 284, this Court took notice that New York State is one of 5 states in the union which enacted laws prohibiting discrimination in privately owned accommodations, in private employment, housing, education and hospitals and created State commissions to enforce such laws.

Surely, State action supporting discrimination cannot be spelled out from alleged inaction in enforcement where the State, in its laws and in its contracts for public work, proscribes discrimination, and where, as here, there is no evidence that any of the petitioners ever made an unheeded complaint to any State agency empowered to enforce the state laws against discrimination.

In *Gaynor* v. *Rockefeller*, 15 N.Y. 2d 120 (1965), Judge Fuld speaking for the unanimous court said:

> "The crux of the complaint as against the defendant public officials is that they have, in effect, condoned unlawful discrimination in employment on public construction projects by dealing with contractors who otbained their labor force from unions which wrongfully exclude qualified Negroes from their membership and apprenticeship programs. Manifestly, however, the discriminatory practices of the unions are in no way chargeable to the State or City, since such unions are neither 'organs of the State itself' nor 'repositories of official power.' (See *Nixon* v. *Condon*, 286 U.S. 73, 88; see, also, *Burton* v. *Wilmington Pkg. Auth.*, 365 U.S. 715, 721-722; *Williams* v. *Yellow Cab Co. of Pittsburgh, Pa.*, 200 F. 2d 302, 307, cert. den. *sub nom. Dargan* v. *Yellow Cab Co.*, 346 U.S. 840.)
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> It is the settled policy of the courts not to review the exercise of discretion by public officials in the enforcement of State statutes, in the absence of a clear violation of some constitutional mandate. (See *People* v. *Ballard*, 134 N.Y. 269, 293; *Matter of Lewis* v. *Lefkowitz*, 32 Misc 2d 434, affd. 17 A D 2d 778.) No basis is here shown for charging the State or City with being a party to the denial to the plaintiffs of the equal protection of the laws in violation of Federal or State constitutional guarantees. Neither the State nor the City has here either affirmatively sanctioned any discriminatory practices by statute or announced policy or, indeed, even knowingly acquiesced therein. (Cf. *Peterson* v. *Greenville*, 373 U.S. 244; *Lombard* v. *Louisiana*, 373 U.S. 267.)
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> * * * * *

> It may well be, as the plaintiffs evidently believe, that judicial proceedings of the ordinary type will not suffice to break the pattern of discrimination which, it is alleged, permeates the construction industry. A full and adequate remedy, is however, available to the plaintiffs by way of resort to the State Commission for Human Rights and there is, accordingly, no warrant for invocation of the aid of equity or for the granting of declaratory relief. (See *Goodman & Co.* v. *New York Tel. Co.*, 309 N.Y. 258, 266, *supra; Kane* v. *Walsh,* 295 N.Y. 198, 206, *supra.*)"

It follows as a natural consequence that the alleged criminal conduct that these petitioners engaged in, seemingly for dramatic purposes, should not entitle them to have the issues tried in the "sanctuary" of the Federal Court. The alleged misconduct is evidently and unquestionably a proper subject matter for State court jurisdiction and determination.

(e). Petitioners have not shown that the opinion below is in conflict with the ruling of any other Circuit.

The petitioners have referred to *Rachel* v. *Georgia, supra* and have spread the opinion of the 5th Circuit in that case through petitioners' Appendix C. *Rachel* concerned itself solely with the effect of section 1443 sub-division 1 and is not relevant to the issue before the Court of Appeals. In fact, *Rachel* relies on this case. At page 39 of the petition the 5th Circuit said: "It cannot be doubted that section 1443 sub-division 1 is today an adjunct of the Civil Rights Act of 1964. See *New York* v. *Galamison,* 2nd Cir., 1965, — F. 2d —, 33 U.S. Law Week 2389."

CONCLUSION

The petition fails to show sufficient reason for consideration of this cause by the United States Supreme Court. The petition for writ of certiorari should be denied.

Respectfully submitted,

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